In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1781

NICKEY CHEVROLET SALES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On May 4, 1965, the court of appeals sustained the Board's finding that Nickey Chevrolet Sales, Inc., had violated Sections 8(a)(3) and (1) of the National Labor Relations Act by discriminatorily discharging two salesmen, and enforced the Board's order (Pet. App. 1a). On November 10, 1965, the court of appeals adjudged the Company in civil contempt for refusing to reinstate these employees (Pet. App. 1a). On September 23, 1966, the Board issued a supplemental decision and order (160 NLRB 1279) directing the Company to pay the two employees backpay in specified amounts. On March 11, 1971, the court of appeals again adjudged the Company in contempt, finding that the Company had unlawfully discharged another salesman, Harold Sergott,

because of his union activities (Pet. App. 16a-23a). The court ordered the Company to offer Sergott reinstatement and to make him whole for salary and other benefits lost as a result of his unlawful discharge (Pet. App. 21a-22a).

On August 6, 1971, the Board's Regional Director issued a backpay specification detailing the amount of money due Sergott for the period from October 5, 1969, the date of his discharge, to March 24, 1971, the date of his reinstatement by the Company (Pet. App. 2a, 7a; A. 49-52).[1] The Company filed an answer thereto (Pet. App. 2a; A. 58-60). When informal attempts to agree upon the amount of backpay due Sergott proved unsuccessful, a backpay hearing was held before a Trial Examiner and decisions were subsequently entered by the Examiner and the Board (Pet. App. 1a-15a; 195 NLRB 395). The Board awarded Sergott a total of $20,606.09 in net backpay, including $17,343.59 for salary lost during the six quarters of the backpay period (Pet. App. 4a-6a; A. 12b-13b).[2]

2. The court of appeals accepted the Company's suggestion that, since the Company's obligation to pay backpay to Sergott arose from the order of the court rather than an order of the Board, "the Board's determination * * * be treated as that of a special master and [be] adopted by [the] court except where clearly erroneous" (Pet. App. 5).[3] In short, the court treated the Board's ap-

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[1]"A." refers to the appendix in the court below.

[2]The Trial Examiner had recommended elimination of backpay from April 30, 1970 to March 24, 1971, on the ground that Sergott had not made a reasonable effort to obtain work during this period (Pet. App. 11a-14a). The Board rejected this recommendation (Pet. App. 4a-5a).

[3]The court's opinion is reported at 493 F. 2d 103.

plication for enforcement of the backpay order as a petition that the court judicially determine the amount of backpay which the Company must pay Sergott to purge itself of contempt under the court's 1971 judgment (Pet. App. 9). The court held that the Board's findings and conclusions were fully supported by the record and adopted them as its own. Respecting the Board's reversal of the Trial Examiner (n. 2, *supra*, the court stated (Pet. App. 6-8):

> The examiner concluded that Sergott's efforts [to find other employment] after April 30, when he was no longer reporting to the employment office, could not be deemed reasonable. The Board reversed this part of the examiner's decision, on the basis that respondent had failed to sustain its burden of establishing that Sergott wilfully incurred a loss of earnings.
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> * * * At the time of discharge, Sergott was 44 years old and had been employed as a salesman by Chevrolet and Cadillac dealers for 18 years. Sergott registered with the state employment agency and reported 29 times up to April 30, 1970. Apparently these did not produce referrals. During the same period he called on 20 car dealers and made some 20 follow up telephone calls. After April 30 and before reinstatement, he made new contacts with four dealers and his total contacts with these dealers and some of those contacted earlier were 72, including a number of phone calls. Sergott testified he directed his later efforts toward those who initially encouraged him. He received no offers except from two dealers who conditioned further consideration on his resignation from the union.

The examiner did not discredit Sergott's testimony, only noting that in his judgment, "many of the contacts made by Sergott were window dressing."

Respondent proved only that there are more than five hundred new and used car dealers in the metropolitan area of Chicago. It offered no testimony as to business conditions during the period or other evidence tending to show that jobs were available for a salesman notwithstanding known union associations, or that the lack of opportunity with the dealers to whom Sergott applied was not representative. Sergott testified that "economically things were a bit slow at this time."

We think that the examiner, in ultimate effect, imposed on Sergott the burden of proving that his efforts were reasonable. Given the efforts Sergott was shown to have made, and in the absence of proof bearing at least generally on the availability of suitable employment in the area, we conclude the respondent did not discharge its burden of proof. Accordingly, we consider the examiner's adverse finding clearly erroneous, and find that Sergott's efforts were reasonable.

3. There is no merit to petitioner's contention that the court below required it to show, not only a lack of due diligence by Sergott in his search for other employment (see *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198), but "seemingly plac[ed] on the employer (almost, if not quite) the burden of proving that due diligence would have geen rewarded" (Pet. 9). The court merely held that, given the efforts Sergott made, the Company, in

showing only that there are more than 500 car dealerships in the Chicago metropolitan area, did not discharge its burden of proving that Sergott "failed to make the requisite 'reasonable efforts to mitigate [his] loss of income * * * .'" *National Labor Relations Board* v. *Madison Courier, Inc.*, 472 F. 2d 1307, 1318 (C.A.D.C.), quoting from *National Labor Relations Board* v. *Arduini Mfg. Corp.*, 394 F. 2d 420, 422 (C.A. 1).

There is also no substance to petitioner's contention that the court "gave too cavalier treatment to that part of Rule 52(a) [of the Federal Rules of Civil Procedure] requiring that due regard be given to the opportunity of the trial court * * * to judge of the credibility of the witnesses" (Pet. 12). As the court of appeals noted, the Trial Examiner "did not discredit Sergott's testimony" as to his numerous attempts to obtain substitute employment (Pet. App. 7), but found that those efforts were not reasonable. The contrary finding of the Board and the court as to the reasonableness of Sergott's efforts did not involve a contrary credibility determination, but merely a different evaluation of the legal effect of the undisputed facts.[4]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

PETER G. NASH,
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National Labor Relations Board.

JULY 1974.

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[4]The dissenting judge agreed that the "standards for determining whether there is back pay entitlement are correctly outlined in the majority opinion" (Pet. App. 11). However, he evaluated the evidence differently than did the court majority (see Pet. App. 12-13).